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IN THE

Supreme Court of the United States

October Term, 1982

FRANCIS X. OROFINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. When a denial of the Sixth Amendment right to effective assistance of counsel has been demonstrated based upon insufficient time to prepare a complex fraud prosecution for trial, must prejudice be demonstrated before relief will be granted?

2. When a denial of the Sixth Amendment right to effective assistance of counsel has been demonstrated based upon insufficient time to prepare a complex fraud prosecution for trial, if prejudice must be demonstrated, what kind or degree of prejudice must be shown before relief will be granted?

3. What minimum standard of competency must be displayed by a defense counsel in a criminal case, in order to satisfy the Sixth Amendment requirement of effective assistance of counsel?

4. Should this Court resolve a split of authority among the Courts of Appeal regarding each of the preceding questions?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Francis X. Orofino petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*) is not reported.

JURISDICTION

The opinion of the Court of Appeals was entered on June 20, 1983, and a petition for rehearing was denied on July 21, 1983 (App. B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

STATEMENT

On July 14, 1982, the petitioner and four co-defendants were charged in a 15 count indictment with mail fraud in violation of title 18 U.S.C. 1341, wire fraud in violation of 18 U.S.C. 1343, sale of unregistered securities in violation of 15 U.S.C. Sections 77e and 77x, inducing investors to travel in interstate commerce in execution of a scheme to defraud in violation of 18 U.S.C. 2314, securities fraud in violation of 15 U.S.C. Sections 78j(b), 78ff, and 14 C.F.R. 240.10b-5 and a conspiracy encompassing all of the above offenses in violation of 18 U.S.C. 371. The allegations of the indictment principally involve activities of a publicly traded corporation, Tellco Information Service, Inc. ("Tellco"), its wholly owned subsidiary Vitorio Widemann International ("VWI"), and an Italian cotton factory, Cotonificio Vitorio Widemann & Co. ("Cotonificio"), during the period of April through September, 1977.

It is alleged that the defendants sold promissory notes of VWI convertible into Tellco stock by misrepresenting to the investors that VWI was the owner of Cotonificio; that Tellco was a promising new company which by acquiring other companies would become a mini-conglomerate worth millions of dollars,

and by failing to disclose that Cotonificio was in desperate financial straits and had suffered losses in the past two years and that Tellco did not intend to contribute capital to Aegis Print Works, Inc. ("Aegis") as required by the agreement through which Tellco had acquired Aegis.

It is further alleged that the proceeds of the sales of convertible promissory notes were used to purchase the stock of Tellco on the over-the-counter market, in order to artificially inflate the price of Tellco stock, and that the promissory notes were not registerd with the Securities and Exchange Commission.

Finally, it is alleged that Forsyth and Orofino fraudulently entered into agreements to purchase raw cotton for Cotonficio from two cotton dealers, Volkart and Molsen and through misrepresentations induced these dealers to deliver cotton which was not fully paid for or which was paid for in part through checks drawn on bank accounts with insufficient funds.

The allegations of the indictment were the subjects of investigations by three Federal agencies: The Securities and Exchange Commission, the United States Attorney's Office for the Southern District of New York, and the Federal Bureau of Investigation, spanning five years.

On September 22, 1977, the Securities and Exchange Commission suspended the trading in Tellco stock. In fact, the SEC had commenced an investigation of Tellco prior to that date and the investigation continued until December 6, 1979, when a civil action was commenced in the United States District Court for the Scuthern District of New York, *SEC v. Tellco*,

et al., 79 Civ. 6649 (CSH), (App. C, *infra* at 8a).

The SEC conducted an in depth investigation which included taking testimony from more than fifty people and requiring the production of numerous books and records.

Also in 1977, the Federal Bureau of Investigation began to receive information about Norman Forsyth and Francis X. Orofino in the course of an investigation of "sophisticated white collar criminal activity." (*Id.* at 8a). On December 6, 1977 the Federal Bureau of Investigation and the United States Attorney's Office for the Southern District of New York requested access to the SEC's Tellco file. On February 21, 1978, the SEC permitted the FBI and the United States Attorney to have access to the Tellco file. Over the course of the next twenty-two months, the FBI conducted an extensive investigation which culminated in submission of a one hundred forty page prosecutive memorandum to the United States Attorney's Office on December 27, 1979. With the FBI's one hundred forty page report in hand and with the availability of thousands of pages of transcripts generated by the SEC investigation, the United States Attorney's Office opened a formal file on the Tellco case on March 13, 1980. (*Id.* at 9a).

For the next twenty-eight months the investigation was continued by the United States Attorney's Office assisted by the FBI and at least one compliance examiner of the SEC. Dozens of witnesses were interviewed and considerable evidence was presented to grand juries, but no indictment was returned until July 14, 1982, because the assistant united states attorney assigned to the case was too busy to devote the

time necessary to complete the grand jury presentation "because (of) its complexities." (*Id.* and Tr. at 346).[1]

By August 9, 1982, the petitioner had been represented by two lawyers appointed by the United States Magistrate pursuant to the Criminal Justice Act 18 U.S.C. 3006A (CJA). The first lawyer asked to be relieved because "the papers were so extensive that he would not have the opportunity to properly represent (the petitioner) within the time limits available to him for that purpose." At that time the trial was scheduled to commence on September 30, 1982, at least seven and one-half weeks from the date upon which the first lawyer was relieved. The second attorney appointed by the Magistrte pursuant to the CJA was disqualified by the trial judge on August 9, 1982, because Mr. Orofino had gross income of $48,000.00 per year (8/9/82 tr. at 1).[2] Mr. Orofino was told that he should retain counsel within ten days and that the trial had been adjourned on motion of the counsel for Co Defendant Forsyth to October 18, 1982 (*Id.* at 2).

During the subsequent court appearances Mr. Orofino informed the Court that he had spoken with several attorneys but could not retain counsel because he was unable to raise sufficient funds for a retainer and that the generation of monies by his business was slow. No attempt was made by the prosecution or the Trial Court to determine what assets Mr. Orofino possessed to retain counsel or to establish his ad-

1. All parenthetical references with the prefix "Tr." refer to the trial transcript.

2. "8/9/82 tr." refers to the transcript of the pre-trial conference held on that date.

justed gross income. Instead, the Court repeatedly warned Mr. Orofino that he would be forced to proceed *pro se* if he did not retain counsel, to which Mr. Orofino replied that he was not prepared to defend himself in a complex litigation and that he would do his best to retain counsel. (9/8/82 tr. at 3-6, and 9/21/82 tr. at 3-5).[3]

Mr. Orofino was finally able to raise the bare minimum necessary to retain private counsel on September 28, 1982, 21 days before trial commenced. Trial counsel had to prepare to meet a complex, multi-pronged indictment involving at least three corporations operating on two continents. The United States Attorney's office made available five cardboard boxes of exhibits including books, records, contracts, bank statements, checks, telexes, financial statements, etc., totalling in the thousands of pages of documents. In addition, counsel had access to approximately 5,000 pages of SEC transcripts relevant to the instant case.

Defense counsel's ability to adequately prepare for trial was further complicated by the following facts. During trial preparation counsel spent two days in Italy where depositions of two government witnesses were conducted. He was required to review affidavits, applications and a court order authorizing electronic surveillance pursuant to Title 18 U.S.C. Section 2518 in order to prepare a motion to suppress conversations of the petitioner which the government offered into evidence at trial. Further, defense counsel had to review concensual tape recorded conversations between the petitioner and an undercover FBI agent which the government proposed to use in cross-examination should petitioner testify. Finally, counsel

3. "9/18/82 tr." and "9/21/82 tr." refer to the transcripts of pretrial appearances on the date indicated.

spent many days in preparation for two proposed government witnesses who were not called to trial. James Sherlock, an unindicted co-conspirator, whose testimony before the Security and Exchange Commission, the Attorney General of the State of New York and the Grand Jury was the most extensive of any proposed government witness was never called to trial. And while the government indicated initially that it would call Fred Pro, the subject of the aforementioned electronic surveillance, as a witness to trial the government ultimately indicated that Mr. Pro would not be a witness.

A motion for a 30 day continuance of the trial date based upon counsel's inability to adequately prepare a defense was heard by the Court on October 15, 1982 and denied (10/15/82 tr. *infra*).[4] Also, during the afternoon of Friday, October 15, 1982, the government delivered approximately 5,000 pages of 3500 material to defense counsel.[5]

The trial commenced on October 18, 1982. During the course of the trial the prosecution offered the testimony of 20 witnesses and moved into evidence 115 exhibits.

The government offered proof that from April through September 1977 investors purchased VWI notes convertible to Tellco stock without having been informed that the Italian cotton mill Cotonificio was experiencing financial difficulties and had been shut

4. "10/15/82 tr." refers to the transcript for the motion for continuance.

5. Some of the 3500 material duplicated SEC transcription previously in the possession of defense counsel.

down for a period of time. (tr. 55-84, 99-108, 171-73, 185-88, 298-22, 238-42, 246-58, 263-70 and 313-29).

Testimony was also presented that cotton brokers had sustained losses either through the shipment of cotton to Italy which remained undelivered at a time when world cotton prices were declining or because some checks issued by VWI and signed by Norman Forsythe had been returned for insufficient funds (tr. 8-11, 13-14, 23-29, and 31-49).

The defense attempted to establish a good faith defense (tr. 288-89 25-96, and 302-303). The defense case consisted of an expert witness to testify that certain notes issued by the Lombard Capital Corporation to an investor were not signed by the petitioner although they bore his name (tr. at 357-61). The petitioner was convicted of ten counts and sentenced to current terms of five years imprisonment, 5 years probation and a fine of $73,000.00.[6]

The Court of Appeals in an unreported opinion held that the trial Court did not abuse its discretion in denying the application for a continuance "given the brief duration of the trial, the straight forward nature of the government's proof, and the relative insignificance of the incidents of prejudice alleged by appellant. . . ." And that the trial court's conclusion that appellant was capable of financing his defense was not clearly erroneous based upon petitioner's

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6. The securities fraud count was dismissed upon motion of the government before trial and four counts were dismissed at the close of the government's case when the government conceeded that it had not called the specific investors involved in those charges.

"failure to show why his cash flow situation rendered him financially unable to retain counsel. . . ." (App. A, *infra*, at 1a-2a).

REASONS FOR GRANTING THE PETITION

This case presents questions of fundamental importance to the administration of criminal justice in the federal courts: First, whether prejudice must be demonstrated when a denial of the Sixth Amendment right to the effective assistance of counsel is predicated upon insufficient time to prepare for trial; second, if prejudice must be demonstrated, what kind or degree of prejudice must be shown before relief will be granted; and finally, what minimum standard of competency must be displayed by a defense counsel in a criminal case in order to satisfy the Sixth Amendment requirement of effective assistance of counsel.

Despite the fundamental nature of these issues, there exists no clear consensus among the Federal courts of Appeal.

The first issue presented is currently before this court. In *United States v. Cronic*, 675 F2d 1126 (10th Cir. 1982), *cert. granted*, 82-660, the United States Court of Appeals for the Tenth Circuit addressed this issue in a case which is factually indistinguishable from the instant case.[7] The Tenth Circuit concluded

7. In fact, in the instant case the defendant had less time to prepare for trial than in *Cronic* (21 days as opposed to 25) and faced a factually and legally more complex litigation. (The instant case involved three corporations on two continents; between five and ten thousand pages of 3,500 material and documentary exhibits; conducting depositions in Italy; preparation of complex motions to suppress the fruits of court authorized electronic

that Cronic's conviction must be reversed because he was deprived of effective assistance of counsel when the trial court allowed twenty-five days for preparation of a multi-count mail fraud prosecution.

It is thus clear that if the instant case had been decided in the Tenth or Sixth Circuits,[8] the petitioner's conviction would have been reversed and the case would have been remanded for a new trial.[9]

The Tenth Circuit's analysis of the prejudice issue should be adopted by this court because it is both logical and the only realistic way to ensure meaningful and effective representation in criminal cases where the issue of ineffective assistance of counsel is predicated upon insufficient preparation. As stated by the Court in *Cronic:*

> "When circumstances impair a given lawyer's preparation of a defendant's case, the defendant need not show specific errors in the conduct of his defense in order to show ineffective assistance of counsel. See *United States v. King,* 664 F.2d 1171, 1173-73 (10th Cir. 1981); *United States v. Golub*, 638 F.2d 185, 187 (10th Cir.), *reversed on other grounds,* 699 F.2d 207 (10th Cir. 1982). This is an imminently reasonable rule, for there is no way an Appellate Court can say precise-

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surveillance; and the need to understand business practices and accounting procedures in both Italy and the United States, involving the cotton brokerage and cotton manufacturing industries.)

8. *Beasley v. United States,* 491 F.2d, 687 (6th Cir. 1974).

9. In view of the almost identical factual contents of the instant case, and in *United States v. Cronic, Supra,* it may be appropriate for this Court to either join these cases for argument or to hold this petition pending the decision in *Cronic.*

ly how a given case would have been handled by a reasonably diligent and properly prepared lawyer. Prejudice for lack of preparation and experience cannot be nicely weighted." *United States v. Cronic, supra*, at 1128.

Finally, the *Cronic* Court recognized that this rule does not conflict with the holding of this court in *United States v. Morrison*, 449 U.S. 361, 101 S. Ct. 665, 66 L.Ed. 2d 564 (1981). *Morrison* involved the invocation of the most drastic remedy when the Court of Appeals had dismissed the indictment, based upon pre-trial interviews of the defendant outside the presence of counsel which yielded no inculpatory statements. Based upon the fact that the constitutional violation could not even theoretically have effected the trial processes, this Court concluded that dismissal of the indictment was inappropriate. *United States v. Morrison, supra*, 449 U.S. at 365.

In contrast, a denial of effective assistance of counsel based upon inadequate time to prepare for complex litigation is fraught with danger which cannot be retrospectively evaluated without speculation. Nevertheless, the circumstances are such as to permit the reasonable inference that a substantial threat of prejudice may be inferred.

Even if this Court should conclude that prejudice must be demonstrated before relief will be granted, it will still be necessary to resolve a conflict among the Circuits concerning the kind and degree of prejudice which must be shown.[10]

10. The cases are collected and discussed by the Fifth Circuit in *Washington v. Strickland*, 673 F.2d 879, 896-900 n. 11-n.20 (5th

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Cir. 1982).

11. In *United States ex rel. Green v. Rundle*, 434 F.2d 1112 (3d Cir. 1970), the Third Circuit noted that the ineffective assistance inquiry cannot stop with a determination as to whether counsel departed from the standard of normal competence:

> In many instances ineffective assistance of counsel may have had so pervasive an effect on the process of guilt determination that it is impossible to determine accurately the presence or absence of prejudice. In other cases changes in circumstances since the original proceedings beyond petitioners' control, such as the death of a witness who was not called, may make it impossible at the time of the habeas corpus petition to determine prejudice. In such instances a finding of departure from the standard of normal competence requires without more, a new trial. In other cases the failure of counsel may be with respect to a narrow issue or area, and it may well be possible, in the habeas corpus proceeding, to determine whether or not the departure from normal competence was prejudicial .... When a habeas petitioner alleges as a ground for relief the failure of counsel to exercise normal competence in presenting specific trial evidence it is reasonable, we think, to put on petitioner the burden of showing that the missing evidence would have been helpful.

Id. at 1115.

In subsequent cases, the Third Circuit has denied habeas relief when it was clear that no prejudice had been shown. *E.g., United States v. Swinehart*, 617 F.2d 336, 341 (3d Cir. 1980) (no prejudice from failure to file suppression motion because motion would have properly been denied; no prejudice from failure to object to prosecutorial suggestion of defendant's guilt because defendant was not prejudiced by comments). The court has also applied the harmless error doctrine to certain ineffective assistance claims. *E.g., United States ex rel. Johnson v. Johnson*, 531 F.2d 169, 177 (3d Cir.), *cert. denied*, 425 U.S. 997, 96 S. Ct. 2214, 48 L.Ed.2d 823 (1976) (petitioner has the burden of proving that he was prejudiced by the variance between counsel's opening statement and his conduct at trial when counsel suggested in opening statement that he would present an alibi defense; however, "while the comment was unfortunate, it was harmless beyond a reasonable

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doubt" when viewed in the context of the entire trial); *United States v. Crowley*, 529 F.2d 1066, 1070-71 (3d Cir.), *cert. denied*, 425 U.S. 995, 96 S. Ct. 2209, 48 L.Ed.2d 820 (1976) (harmless error doctrine applies to denial of counsel at hearing on motion to withdraw guilty plea when the defendant alleges neither that he is innocent or that his original plea was involuntary and when it is clear that the defendant is not entitled to withdraw his guilty plea). But see, *Boyer v. Patton*, 579 F.2d 284, 288-89 (3d Cir. 1978) (involving prosecutorial comments on the defendant's silence at the time he was arrested—in which the court has held that the facts "demand the finding that [the defendant] was prejudiced as a matter of law").

12. The Eighth Circuit's position on this issue was clearly marked in *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974):

> Evaluation of a habeas corpus petition alleging ineffective assistance of counsel is a two-step process: first, determining, as we have already done, whether there has been a failure to perform some duty, as essential as the duty of investigation, owed by a defense attorney to his client; and second, determining, as will be done on remand, whether that failure prejudiced his defense. This second step is necessary, we believe, because the failure to investigate—though a constitutional error—might in certain circumstances be a "harmless" one and hence would not justify habeas corpus relief. We are guided in this regard by *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967), where the Court fashioned its harmless-constitutional-error rule.

Id. at 218. The court elaborated on this concept:

> We ought not to intervene in the criminal process unless and until it can be shown that the alleged error itself prejudiced the petitioner in obtaining a fair trial. But this is *not* to say that, on remand, petitioner must prove his innocence by even so much as a preponderance of the evidence; nor should we be understood to suggest that the Court may trespass upon what properly would have been the jury's province of weighing the truth or falsity of this evidence at the original trial. What we are saying is that, here, the petitioner must shoulder the burden of showing the existence of admissible evidence which could have been uncovered by reasonable in-

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> vestigation and which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial. Once this showing is made, a new trial is warranted unless the court is able to declare a belief that the omission of such evidence was harmless beyond a reasonable doubt. . . .
>
> In lieu of such a showing, we hasten to add, the defendant must be allowed to demonstrate that changed circumstances beyond petitioner's control have made it impossible to produce any helpful evidence at this time. The latter circumstances, if proved, would serve to shift to the state the burden of showing the absence of any prejudice in the trial because of the inadequacy of the defendant's counsel.

Id. at 220 (emphasis in original).

The Eighth Circuit has consistently adhered to the *McQueen* Standard. *See, e.g., Ford v. Parratt*, 638 F.2d 1115, 1118 (8th Cir. 1981) (when defendant enters a guilty plea, prejudice inquiry necessarily centers upon whether counsel's failure to investigate prejudiced defendant's ability to make an intelligent and voluntary guilty plea); *Morrow v. Parratt*, 675 F.2d 411, 413-14 (8th Cir. 1978) (petitioner prejudiced by counsel's failure to interview eyewitnesses because the evidence counsel would have discovered thereby "may have completely changed the defense strategy"); *Harshaw v. United States*, 542 F.2d 455, 456-57 (8th Cir. 1976) (petitioner failed to establish he was prejudiced by counsel's failure to conduct a pretrial investigation when record reflected "no allegation of anything such investigation might have been expected to produce and no indication of how its omission, if it occurred, was derelict and prejudicial"; neither was there prejudice from counsel's failure to make frivolous objections).

13. Sitting en banc, the Ninth Circuit in *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974, 99 S. Ct. 1542, 59 L.Ed.2d 793 (1979), explained its approach to the prejudice requirements as follows:

> When the claim of ineffective assistance rests upon specific acts and omissions of counsel *at trial*, as it does in this case, relief will be granted only if it appears that the defendant

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was prejudiced by counsel's conduct.

Id. at 1331 (emphasis added). The court followed this holding with two cautionary comments:

> If counsel is charged with multiple errors at trial, absence of prejudice is not established by demonstrating that no single error considered alone significantly impaired the defense—prejudice may result from the cumulative impact of multiple deficiencies.
>
> Finally, the requirement that prejudice appear does not mean that relief is available only if the defendant would have been acquitted but for counsel's blunders.

Id. at 1333.

In *Ewing v. Williams*, 596 F.2d 391, 395-97 (9th Cir. 1979), the Ninth Circuit extended in full the holding of *Cooper v. Fitzharris* to ineffective assistance claims predicated on a lack of pretrial preparation, and in *United States v. Altamirano*, 633 F.2d 147, 152-53 (9th Cir. 1980), the court made clear that this standard applies both to direct appeals and collateral attacks. Apparently, however, the court has not clearly articulated the degree of prejudice that must be shown. *Compare Altamirano*, 633 F.2d at 153 (counsel's "many unprofessional acts when reviewed in the context of the entire trial did not deprive appellant of a fair trial," because the defendant's case "depended almost entirely upon his credibility," which was not impugned by counsel's failings), *with Cooper v. Fitzharris*, 586 F.2d at 1341 (Hufstedler, J., dissenting) ("While I do not agree that prejudice must be shown, if the majority nonetheless adopts a harmless error approach, *Chapman v. California* . . . would govern the burden of proving prejudice"; burden would therefore be on prosecution to prove that the constitutional error was "harmless beyond a reasonable doubt.")

14. While the Court of Appeals for the District of Columbia has written extensively on the topic of prejudice, no clear rule emerges from *DeCoster v. United States*, 624 F.2d 196 (D.C. Cir.) (en banc), *cert. denied*, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979), and its progeny. A plurality of the court held that "the accused must bear the initial burden of demonstrating a likelihood that counsel's inadequacy *affected the outcome of the*

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trial"; thereafter, "the conviction cannot survive unless the government demonstrates that it is not tainted by the deficiency, and that in fact no prejudice resulted"; if the showing by the accused causes the court serious misgivings notwithstanding the absence of a constitutional violation, government may prevail upon showing short of the *Chapman* standard. 624 F.2d at 208 & n. 74 (opinion of Leventhal, J., joined by three judges) (emphasis added). A concurring opinion held that "a defendant must show *substantial unfair prejudice to his defense* resulting from a substantial violation of duty owed him by his counsel," at which point the burden shifts to the government to rebut this showing. *Id.* at 232 (MacKinnon, J., joined by two judges) (emphasis added). The dissent argued that once a petitioner has established his trial counsel's ineffectiveness, the burden is on the government to establish that any error was harmless beyond a reasonable doubt. *Id.* at 290-95 (Bazelon, J., dissenting, joined by one judge).

The en banc court's subsequent interpretation of *DeCoster* adds little:

> [A] majority of the court is of the view that defendant does bear the burden of showing that counsel's substantial breach was likely to have resulted in prejudice to appellant's case. That is the formulation in Judge Leventhal's opinion . . . . It is necessarily included in the burden assigned to defendant in Judge MacKinnon's opinion: that defendant show that he actually suffered "unfair prejudice" as a result of counsel's breach.

United States v. Wood, 628 F.2d 554, 559 (D.C. Cir. 1980) (en banc) (per curiam). *Wood* can be read to suggest that the petitioner need not show that he would have been acquitted, but for counsel's incompetence, in order to satisfy *DeCoster's* requirement that he show an effect on "the outcome of the trial": "In order to secure a reversal, appellant must establish some basis for believing that a different kind of preparation would have resulted in the presentation of a contrary line of testimony for the jury's consideration." *Id.* at 559. Subsequent panel opinions are inconclusive on this point. *See, e.g., United States v. Hinton*, 631 F.2d 769, 782-83 (D.C. Cir. 1980) (noting only that under *DeCoster* and *Wood* a defendant must establish that he has suffered "likely prejudice," at which point the government must

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prove beyond a reasonable doubt that the deficiencies were harmless). *But see United States v. Patterson*, 625 F.2d 1046, 1048 (D.C. Cir. 1981) ("No counsel however skillful could have 'affected the outcome' of this case where appellant's identity was fixed by three eyewitnesses to the commission of the offense and no greater number of unidentified alibi witnesses, more than the three presented, would have prevented the inescapable jury finding of guilt.").

15. The Second Circuit requires that "claims of ineffective assistance must be premised on actual, not possible, prejudice to the client." *United States v Aulet*, 618 F.2d 182, 188 (2d Cir. 1980) (following *LiPuma v. Commissioner, Department of Corrections*, 560 F.2d 84, 92 (2d Cir.), *cert. denied*, 434 U.S. 861, 98 S.Ct. 189, 54 L.Ed.2d 135 (1977)). *Cf. United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976) (when defendants claim that potential conflict of interest on the part of their joint attorney prejudiced their cause, some specific instance of prejudice must be shown before it can be said that they received ineffective assistance).

On some occasions, the Second Circuit has cited this rule in rejecting ineffective assistance claims because there has been *no* showing of prejudice. *E.g., Aulet*, 618 F.2d at 188 ("[H]ad a motion to suppress been made it would have been unsuccessful."); *LiPuma*, 560 F.2d at 92-93 (same). On other occasions, however, the Second Circuit's emphasis on the strength of the prosecution's case approaches an "outcome-determinative" analysis. *See, e.g., United States v. Williams*, 575 F.2d 388, 393 (2d Cir.), *cert. denied*, 439 U.S. 842, 99 SCt. 134, 58 L.Ed.2d 141 (1978) ("Other actions by [counsel], such as his tardy and unsuccessful application for production of a defense witness to discredit [the key prosecution witness], are not, to be sure, actions dictated by the demands of trial strategy. But given the strength of the government's case against [the defendant], it is extraordinarily unlikely that [the defendant] was at all prejudiced by his attorney's judgment."); *United States ex rel. Bradley v. McMann*, 423 F.2d 545, 657-58 (2d Cir. 1970), *cert. denied*, 400 U.S. 994, 91 S.Ct. 464, 27 L.Ed.2d 442 (1971) (rejecting ineffective assistance claim premised on counsel's failure to consult adequately with defendant, which resulted in counsel's failure to verify and bolster an alibi defense, because "[a]ppellant's alleged

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alibi was apparently not disclosed to counsel at a conference several hours before the trial began, but was mentioned for the first time when appellant testified"; moreover, the prosecution's rebuttal testimony "destroyed" the alibi, "thus bel[ying] the claim of prejudice resulting from the belated preparation of his trial counsel").

16. In *Coles v. Peyton*, 389 F.2d 224 (4th Cir. 1968), *cert. denied*, 393 U.S. 849, 89 SCt. 80, 21 L.Ed.2d 120 (1968), the Fourth Circuit held that

> [a]n omission or failure to abide by these requirements [of prompt appointment of counsel, adequate opportunity to prepare a defense, adequate consultation, and appropriate investigation] constitutes a denial of effective representation of counsel unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish a lack of prejudice thereby.

Id. at 226. In subsequent cases, the Fourth Circuit appears to have alluded to the prejudice requirement only briefly and obliquely. *See, e.g., Via v. Superintendent, Powhatan Correctional Center*, 643 F.2d 167, 175 (4th Cir. 1981) (finding "obvious" the prejudice the petitioner suffered when counsel pressured him into pleading guilty in part because counsel was unprepared to try the case: "Via had a right to plead not guilty and go to trial . . . . He was prejudiced when this right was frustrated because his counsel was unprepared to represent him effectively."); *Marzullo v. Maryland*, 561 F.2d 540, 546 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978) (noting simply that attorney's failure to exclude jury during interrogation of the prosecuting witness about the crime charged in another rape indictment "failed to protect [the defendant] from the prejudicial effects of the jury's exposure to the first rape charge").

17. On at least one occasion, the First Circuit has declined to grant habeas relief at least in part on grounds that there had been no showing of prejudice. *United States v. Ritch*, 583 F.2d 1179, 1181 (1st Cir.), *cert. denied*, 439 U.S. 970, 99 S.Ct. 463, 58 L.Ed.2d 430 (1978) (petitioner had demonstrated no prejudice from counsel's failure to file suppression motion because motion would have been denied; neither was he prejudiced by counsel's failure to interview potential defense witnesses because the

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substance of their testimony was in fact presented to the jury). One week later, the First Circuit noted that "[t]he circuits are split on the question of whether an infraction of the sixth amendment right to effective assistance can ever be treated as harmless error, and if so, which party has the burden of proof." *United States v. Bosch*, 584 F.2d 1113, 1122 (1st Cir. 1978). But the court concluded that because "the error was clearly not harmless in the present case, we leave for another day the issue of whether deprivation of effective assistance can ever constitute harmless error." *Id.* at 1123.

18. In *United States ex rel. Healey v. Cannon*, 553 F.2d 1052, 1057 n. 7 (7th Cir.), *cert. denied*, 434 U.S. 874, 98 S.Ct. 221, 54 L.Ed.2d 153 (1977), the court rejected the conclusion of an Illinois appellate court that any mistaken advice afforded the petitioner constituted harmless error due to the overwhelming evidence of guilt; the court noted that "the harmless error doctrine is patently inapplicable to the claimed deprivation of a due process right so fundamental as the effective assistance of counsel." Yet in denying habeas relief in *United States v. Berkwitt*, 619 F.2d 649, 659 (7th Cir. 1980), the court relied in part on the petitioner's failure "to support his contention [of ineffective assistance] with any specific instance of prejudice." And in *United States v. Cooper*, 580 F.2d 259, 263 n.8 (7th Cir. 1978), the court noted that "[t]here has been no showing by appellant whatsoever that a defense of insanity would have been meritorious and that waiver of such a defense [by counsel] was prejudicial." Finally, in *United States v. Ingram*, 477 F.2d 236, 240 (7th Cir.), *cert. denied*, 414 U.S. 840, 94 S.Ct. 94, 38 L.Ed.2d 76 (1973), the court explicitly rejected an ineffective assistance claim on grounds that none of counsel's five purported failings had been prejudicial.

19. In *United States v. Porterfield*, 624 F.2d 122 (10th Cir. 1980), the Tenth Circuit rejected the suggestion that

> "prejudice" is a second tier in the test of incompetency. Reasonable diligence and skill is the test. It would be a mockery in this case to say that the defendant was clearly guilty and that the incompetence of counsel made no difference. Where, as here, the incompetence of counsel is persuasive, the defendant ought not to be required to prove pre-

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> judice on top of the inadequacy. The burden should be on the government to establish the lack of prejudice . . . . Nor is this a case in which discrete trial errors had been committed. *Cf. Cooper v. Fitzharris* . . . .

Id. at 125. In *United States v. Golub*, 638 F.2d 185 (10th Cir. 1980), the court stopped short of holding that prejudice is never relevant, but declined to require such a showing in the case before it: "[P]roof of specific prejudice is not always required in order to render assistance of counsel ineffective, particularly when, as here, the record establishes that trial counsel simply did not have adequate time to prepare for trial." *Id.* at 190. In that case, "[t]he surrounding circumstances, in and of themselves, evidence[d] the prejudice without further proof." *Id.* Most recently, however, the Tenth Circuit has indicated that both of these holdings may be "questionable" in the light of *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981), and decisions from other circuits. *See United States v. King*, 664 F.2d 1171, 1173 (10th Cir. 1981); and *United States v. Payne*, 641 F.2d 866, 867-68 (10th Cir. 1981).

20. The Sixth Circuit appears to be alone in failing to require any showing of prejudice from counsel's ineffective representation. In *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974), the Sixth Circuit held that "[h]armless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel." *Accord, United States v. Yelardy*, 567 F.2d 863, 865 n. 1 (6th Cir.), *cert. denied*, 439 U.S. 842, 99 S.Ct. 133, 58 L.Ed.2d 140 (1978). *Cf. United States v. Sumlin*, 567 F.2d 684, 688-89 (6th Cir. 1977), *cert. denied*, 435 U.S. 932, 98 S. Ct. 1507, 55 L.Ed.2d 529 (1978) (finding harmless beyond a reasonable doubt the admission of evidence that petitioner claimed should have been suppressed because it was obtained from defendant by FBI agents while defendant was represented by allegedly ineffective counsel). Although the court reaffirmed *Beasley's* holding in *McKeldin v. Rose*, 631 F.2d 458, 460-61 (6th Cir. 1980), *cert. denied*, 450 U.S. 969, 101 S.Ct. 1488, 67 L.Ed.2d 619 (1981), the court qualified it by holding that "[w]here the error occurs at a preliminary hearing in state proceedings and the state invokes harmless error as a

The instant case presents an appropriate vehicle for resolution of this conflict among the circuits, because the petitioner demonstrated prejudice,[11] but

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reason for denying relief, a harmless error analysis is required." Of course, the general rule recognized in the Sixth Circuit may be subject to modification after *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981), discussed *infra* in text. *Cf. Turner v. Engel*, 673 F.2d 1331 (6th Cir. 1981) (citing in dicta *Walker v. Solem*, 648 F.2d 1188, 1189 (8th Cir. 1981), for the proposition that the petitioner "must show both incompetence and material prejudice resulting from the incompetence in order to prevail on his claim.")

11. While it is difficult if not impossible, to determine the full range and course of trial preparation, had petitioner been permitted sufficient time to prepare, as noted in the petition for rehearing, the following exculpatory evidence which remained unknown to defense counsel until after the trial, would have been presented.

1. Tellco was run by Norman Forsyth not Orofino;

2. Orofino had no authority in the company. All power including signatory power for the bank account was in Forsyth who was the President;

3. When the company moved its offices to 39 Broadway, Forsyth refused to give Orofino an office and instructed this co-defendant not to allow Orofino to use his office;

4. Forsyth told the others involved not to associate with Orofino;

5. Forsyth was secretive about investments collected and commissions paid. Forsyth would take Sherlock outside of the presence of the others including Orofino whenever investments were to be discussed.

6. Forsyth had told everyone involved that money raised from the sale of notes would be used to purchase raw cotton;

7. Orofino continually begged Forsyth for money to buy raw cotton. Orofino told Forsyth that if they just had 100 bales per month the cotton company would be in great financial condition;

8. Orofino strongly objected to a trip for potential investors to view the Italian cotton mill over the July 4, 1977 weekend. Orofino told Forsyth the money should be used to buy cotton;

the Second Circuit rejected that claim based upon its rule that the defendant must demonstrate actual particularized instances of prejudice and not merely the possibility of prejudice. See *United States v. Aulet*, 618 F.2d 182, 188 (2d Cir. 1980); *United States v. Rastelli*, 551 F.2d, 902, 906 (2d Cir.), *cert. denied*, 434 U.S. 831 (1977).

By way of contrast, the decision of this case in the District of Columbia would undoubtedly have resulted in a reversal of petitioner's conviction. The District of Columbia Circuit requires only that a defendant demonstrate "likely prejudice" flowing from ineffective assistance of counsel. *United States v. Hinton*, 631 F.2d 769, 782-83 (D.C. Cir. 1980).

There also exists a split among the circuits concerning the minimum standard of competency which must be displayed by a defense counsel in a criminal case, in order to satisfy the Sixth Amendment requirement of effective assistance of counsel. The disarray among the circuits was noted by Justice White with whom Justice Rehnquist joined dissenting from this Court's denial of certiorari in *Maryland v. Marzullo*, 435 U.S. 1011, 98 S. Ct. 1885, 56 L.Ed. 2d 394 (1978). Justice White in listing the cases noted at least three different standards which were employed by various Court of Appeals. Since that time the 1st and 10th Circuit Courts of Appeals have abandoned the "mockery, sham or farce" standard. See *United States v. Bosch*,

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9. If Forsyth had listened to Orofino the cotton company would have been in a strong financial position; and

10. The Comptroller of the Italian cotton company had stated that for every dollar invested in raw cotton, three dollars in income is generated.

584 F.2d 1113 (1st Cir. 1978) and *Dyer v. Crisp*, 613 F.2d 275 (10th Cir.) (en banc), *cert. denied*, 445 U.S. 945, 100 S. Ct. 1342, 63 L.Ed.2d 779 (1980).

Today, the Second Circuit stands alone in adhering to the archaic and unrealistic doctrine that the defendants' Sixth Amendment right to effective assistance of counsel is not violated unless counsel's representation reduces the trial to a mockery, sham or farce.

This Court has repeatedly held that the right to counsel is fundamental to a fair trial. *Gideon v. Wainwright*, 372 U.S. 335, 83 SCt. 792, 9 L.Ed. 2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 SCt. 55, 77 L.Ed 158 (1932), and that the right to counsel means the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 SCt. 1441, 25 L.Ed. 2d 763 (1970). This court should establish a uniform standard for determining whether this fundamental right has been deprived.

In this case the Circuit Court of Appeals affirmed on the basis that petitioner had not adequately demonstrated prejudice. Therefore, it did not reach the issue of the appropriate standard to be employed in accessing competency of counsel. However, upon reconsideration, after this Court has articulated the appropriate tests in accessing prejudice, the issue of the standard to be employed in determining whether petitioner was deprived of the effective assistance of Counsel, must be addressed.

Because this case presents several fundamental constitution issues which have divided the Circuit Courts of Appeals and because one of those issues is

currently before this Court, certiorari should be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

CHARLES L. WEINTRAUB
Attorney for Petitioner
285 Madison Avenue
New York, N.Y. 10017
(212) 679-2988

September, 1983

APPENDIX "A"

ORDER DATED JUNE 20th, 1983

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of June, One Thousand Nine Hundred and Eighty-three.

PRESENT:
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. LAWRENCE W. PIERCE,
HON. JOHN MINOR WISDOM,*
Circuit Judges

UNITED STATES OF AMERICA,

Appellee,

v.

FRANCIS X. OROFINO,

Defendant-Appellant.

Francis X. Orofino appeals from a judgment of the United States District Court for the Southern

* Senior Circuit Judge of the Fifth Circuit, sitting by designation.

District of New York (Pollack, J.), entered December 2, 1982, convicting him, after a jury trial, of mail, wire, and securities fraud, and conspiracy to commit the same. We affirm.

The trial judge did not deny appellant the effective assistance of counsel or due process of law when he revoked appellant's assigned counsel status and denied the request for a continuance submitted by appellant's subsequently retained counsel. In view of Orofino's failure to show why his cash flow situation rendered him financially unable to retain counsel, the district court's finding that appellant was able to finance his defense was not clearly erroneous. *See* 18 U.S.C. §3006A(c); *United States v. Ellsworth*, 547 F.2d 1096, 1098 (2d Cir. 1976), *cert. denied*, 431 U.S. 931 (1977); *United States v. Rubinson*, 543 F.2d 951, 964 (2d Cir.), *cert. denied sub nom. Chester v. United States*, 429 U.S. 850 (1976). Also, given the brief duration of the trial, the straight-forward nature of the Government's proof, and the relative insignificance of the incidents of prejudice alleged by appellant, the trial court did not abuse its discretion in denying defense counsel's application for a continuance. *See United States v. Bagaric*, __F.2d__, No. 82-1247, slip op. at 3195 n. 21 (2d Cir. April 14, 1983); *United States v. Cicale*, 691 F.2d 95, 106-07 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3749 (April 18, 1983); *United States v. Rastelli*, 551 F.2d 982, 906 (2d Cir.), *cert. denied*, 434 U.S. 831 (1977); *United States v. Bentvena*, 319 F.2d 916, 935 (2d Cir. 1963).

Appellant has failed to establish a violation of the Government's obligation under *Brady*. Inasmuch as Orofino should have known of his confederates' positions with respect to the financial viability of the

Italian company, it cannot be said that the Government suppressed information favorable to him. *See United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3552 (January 24, 1983).

Counts 7 and 8 of the indictment were not factually defective by the omission of the "sale" element of an offense under 15 U.S.C. §773(a). Orofino asserts no prejudice as a result of the omission. *See United States v. Bagaric, supra*, at 3178; *United States v. Carrier*, 672 F.2d 300, 303 (2d Cir.), *cert. denied*, 50 U.S.L.W. 3998.02 (June 21, 1982). Moreover, Count 1 of the indictment details the sales of securities, and the trial judge properly charged the jury on this element of the offense.

Any error by the trial judge in allowing the testimony of Peter Davey and Martin Dillon would be harmless in view of the substantial evidence of Orofino's guilt. Moreover, given the minimal prejudicial effect, if any, of the judge's questioning of Michael Zucker, and the substantial evidence of guilt, any error again would be harmless. *See United States v. Robinson*, 635 F.2d 981, 984-85, 986 (2d Cir. 1980), *cert. denied*, 451 U.S. 992 (1981). The exclusion of the opinion testimony of Zucker does not constitute reversible error, inasmuch as any such testimony would go to the appellant's expectation of the future viability of the company, a legally irrelevant issue.

Judgment affirmed.

s/Hon. Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland

s/Hon. Lawrence W. Pierce
Hon. Lawrence W. Pierce

s/Hon. John Minor Wisdom
Hon. John Minor Wisdom

(N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.)

APPENDIX "B"

ORDER DATED JULY 21st, 1983

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-first day of July, one thousand nine hundred and eighty-three.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANCIS X. OROFINO, NORMAN T. FORSYTH,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Francis X. Orofino,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. Daniel Fusaro, Clerk

s/Victoria C. Dalton
by Deputy Clerk

APPENDIX "C"

AFFIDAVIT OF PAMELA ROGERS CHEPIGA IN OPPOSITION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v.-

NORMAN FORSYTH, *et al.*,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF N.Y.)

PAMELA ROGERS CHEPIGA, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the Southern District of New York and, together with Assistant United States Attorney Carl T. Solberg, I am presently in charge of the prosecution of the above-captioned case. I submit this affidavit in opposition to the motion of defendant Norman Forsyth to dismiss the charges pending against him on the basis of pre-indictment delay. This affidavit is based upon a review of the relevant files of both the United States Attorney's Office and the Federal Bureau of Investigation, as well as on conversations with Assis-

tant United Stats Attorneys Eugene N. Kaplan and Jane Parver.

2. In 1977 during the course of an investigation into sophisticated white collar criminal activity—the principal target of which was the multi-convicted Sy Yoakum Guthrie III—Assistant United States Attorney Eugene N. Kaplan and Federal Bureau of Investigation Special Agent Erick Vail began to receive information concerning the activities of Francis X. Orofino and Norman Forsyth who were then working together under the name Lombard Capital out of an office at 12 East 86th Street in Manhattan. The purchase of an Italian cotton factory was but one of a number of Orofino's and Forsyth's questionable activities which were brought to the attention of the FBI.

3. At approximately the same time, April 1977, the stock of Tellco, a corporation of which Forsyth was President and of which the Italian cotton factory was made a subsidiary, was being traded over-the-counter at 25 cents per share. Within five months the stock skyrocketed to 8 dollars per share and on September 22, 1977 the Securities and Exchange Commission ("SEC") suspended public trading in Tellco stock. Both prior to and following the suspension of trading of Tellco stock the SEC conducted its own independent investigation which culminated in the filing of a civil action, *SEC v. Tellco,* 79 Civ. 6649 (CSH), on December 6, 1979.

4. On December 6, 1977 Assistant United States Attorney Kaplan, in conjunction with the FBI investigation described in Par. 2, *supra,* requested access to the Securities and Exchange Commission's

files on Tellco. Access was granted by the SEC on February 21, 1978.

5. The FBI began to treat the Tellco matter as an independent offshoot of the Guthrie case and conducted its own lengthy and detailed investigation, the focus of which was substantially different from that of the SEC. Upon the completion of its investigation, the FBI on December 27, 1979 submitted a 140 page prosecutive report to the United States Attorney's Office for the Southern District of New York.

6. On March 13, 1980, after reviewing the FBI's prosecutive report, the United States Attorney's Office formally opened a file on the Tellco matter, United States Attorney File No. 80-0892. At approximately the same time Assistant United States Attorney Kaplan was promoted to the administrative position of Deputy Chief of the Criminal Division, and the Tellco investigation was reassigned to Assistant United States Attorney Jane Parver. Although devoting sufficient time to the Tellco investigation to interview dozen of witnesses and to present considerable evidence to the Grand Jury, Assistant United States Attorney Parver was unable to complete the Grand Jury presentation because its complexity demanded a time commitment she was unable to give to it due to the press of other trial and investigative assignments. Consequently, in approximately March 1982, Special Assistant Unitd States Attorney Seth Taube was given primary responsibility for the finalization of the Tellco investigation and was in charge of the matter through July 1982, when the indictment was filed. In July 1982 the case was once again re-assigned when Mr. Taube left the United States Attorney's Office.

7. The investigation was at all times conducted in good faith and at no time was it purposely delayed. All reassignments of the case, with any delays necessarily attendant thereto, were made for valid law enforcement purposes. Indeed, the passage of time and potential fading of recollections makes the prosecution more difficult for the Government, which bears the heavy burden of proving its case beyond any reasonable doubt, than for the defense. While the defense argues that the Government delayed to gain some "tactical advantage" (Traub Aff'd Par. 13), it does not specify or even hypothesize what conceivable advantage the Government could have gained from any delay.

8. In the affidavit and brief submitted on behalf of Forsyth, there are repeated references to his being unrepresented in the SEC proceeding. In fact, the firm of Gusrae, Greene & Kaplan did represent Forsyth at various times during the SEC investigation and when Forsyth appeared at the SEC on August 30, 1978, he refused to answer any questions and invoked his fifth amendment privilege "upon advice of counsel." (SEC Tr., Ex. F. to Traub Aff'd, p. 7). Again, when his deposition in the civil proceeding was taken on May 20, 1981, Forsyth refused to answer any questions and invoked his privilege against self-incrimination. Contrary to the assertion in Par. 3 of the Traub affidavit, Forsyth made no statements in the context of the civil case which could be used against him in this criminal proceeding.

9. Forsyth has long been aware of the possibility of a criminal prosecution; he was never misled by the Government into believing that his liability was exclusively civil. As early as August 30, 1978 Forsyth

was advised by the SEC of a potential criminal prosecution based on the same acts which were the basis of their civil investigation. (See SEC Tr., Ex. F to Traub Aff'd, p. 4). Moreover, on April 12, 1979 Forsyth was interviewed by two FBI agents, whose jurisdiction is exclusively criminal. Finally, on January 7, 1981 Forsyth was subpoenaed by the Grand Jury to produce all corporate books and records for Tellco and several other corporate entities. He appeared in the Grand Jury and did produce the subpoenaed records. At the time he made the Grand Jury production Forsyth—repeatedly characterized in the Traub affidavit as "uncounseled"—was represented by the firm of Grand & Ostrow.

10. The Grand Jury also subpoenaed and obtained all Tellco related records of two brokerage firms, Willis E. Burnside & Co. and Heineman, Franklin, In. These records are in the possession of the United States Attorney's Office and have been made available to Forsyth's counsel. Moreover the personnel of those firms with whom Forsyth dealt, who according to the Government's information did not primarily include Willis Burnside himself, are still in New York and available to testify.

11. In Par. 9 of the moving affidavit, Mr. Traub sttes that "*as a result of* the long standing investigation and Civil Action relating to Tellco" Mr. Forsyth "has lost his home, family and had a heart attack." This statement is most disingenuous. Since this investigation began, Mr. Forsyth was indicted by the State of New York for bribery of a state official, proceeded to trial, and was sentenced to and then served one year in prison, from which he was released only recently. Blithely omitting any reference to these

facts, the defense attributes all of Forsyth's health and family problems solely to the lengthy pendency of the Tellco investigations. The need to stoop to such a distortion of fact is a reflection of the complete lack of substance in the present motion.

s/Pamela Rogers Chepiga
PAMELA ROGERS CHEPIGA
Assistant United States Attorney

Sworn to
August 19th, 1982

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